

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 29, 2006 Session

**INTERSTATE MARKETING CORPORATION v. EQUIPMENT
SERVICES, INC., d/b/a BLACKHAWK KJ**

**Direct Appeal from the Chancery Court for Davidson County
No. 04-1252-III Ellen H. Lyle, Chancellor**

No. M2005-00208-COA-R3-CV - Filed on June 6, 2006

The trial court dismissed Plaintiff's action upon determining the contract at dispute was governed by Tennessee Code Annotated § 47-25-1301 et seq. as it existed prior to being amended by the General Assembly in 1999. We reverse and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and DONALD P. HARRIS, SR. J., joined.

J. Thomas Martin and S. Ralph Gordon, Nashville, Tennessee, for the appellant, Interstate Marketing Corporation.

Robert E. Boston and Derek W. Edwards, Nashville, Tennessee, for the appellee, Equipment Services, Inc., d/b/a Blackhawk KJ.

OPINION

This dispute requires us to determine whether Tennessee Code Annotated § 47-25-1301, *et seq.*, as amended in 1999, applies to a contract originally executed by the parties in 1994. Defendant Equipment Services, Inc., d/b/a Blackhawk KJ ("Blackhawk") manufactures vehicle alignment and collision repair equipment. Its products are distributed by contractual sales representatives. Plaintiff Interstate Marketing Corporation ("IMC") was one of Blackhawk's sales representatives.

The parties entered into a sales representation agreement as early as 1980. In 1994, they entered into the contract which is the subject of this lawsuit.¹ Under the contract, IMC agreed to use its best efforts to maximize product sales in its territory. The geographic territory and products covered by the contract were specified in Exhibit A of the agreement. Paragraph 1 of the contract provided that Exhibit A could be amended from time to time. Paragraph 2 of the contract provided that IMC would “achieve a reasonable minimum sales volume level as established . . . from time to time[.]” The sales volume level was set forth in Exhibit B.

Paragraph 18 of the 1994 contract provided that the contract was immediately terminable “with cause” in enumerated circumstances. It also provided that either party could terminate the agreement upon ninety-days written notice. Paragraph 21 of the contract provided an acknowledgment that IMC “has not paid, and will not pay, any money, franchise fee or sum . . . to become a Representative;” paragraph 13 provided a no-compete clause; and paragraph 23 provided that the contract reflected the entirety of the parties’ agreement. Paragraph 25 provided that the terms of the contract could be modified only in writing. The contract included no expiration date.

The parties annually amended and modified the sales quota specified in Exhibit B. In 2001, Blackhawk also adjusted Exhibit B to provide that Blackhawk could apply a ninety-day sales probationary period if IMC did not meet the sales target.

On December 30, 2002, Blackhawk notified IMC in writing that it was terminating the contract pursuant to paragraph 18, effective March 30, 2003.² In the December termination letter, Blackhawk stated it “elect[ed] to terminate the Sales Representation Agreement” as part of “formulating a new market strategy” designed to make Blackhawk “more competitive in the market place.” Blackhawk did not terminate for any cause enumerated in the contract. According to Blackhawk, it repurchased IMC’s inventory, although it had no contractual obligation to do so.

On April 28, 2003, IMC filed a complaint against Blackhawk in the Chancery Court for Davidson County. In its complaint, IMC alleged it had “acted as exclusive franchisee for the sale or distribution” of Blackhawk’s products in its territory; that it had generated “multi-millions of dollars” in annual sales; and that Blackhawk had terminated the contract without cause. IMC further alleged it was a retailer as defined in Tennessee Code Annotated § 47-25-1301, and that Blackhawk had wrongfully terminated the contract under Tennessee Code Annotated § 47-25-1302(a).³ IMC

¹The original signatories to the 1994 contract were IMC and Hein-Werner Corporation, d/b/a Collision Repair Equipment Services, Blackhawk’s predecessor in interest.

²The writing is dated December 30, 2003. However, the parties do not dispute that the correct date is December 30, 2002, and IMC asserts it received the writing on or about January 2, 2003.

³ Tennessee Code Annotated § 47-25-1302(a) provides:

(a) No supplier, directly or through an officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a retail agreement without good cause. "Good

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prayed for damages of \$5,000,000, costs, and attorney's fees under Tennessee Code Annotated § 47-25-1311(a).

On July 1, 2004, Blackhawk moved to dismiss IMC's complaint for failure to state a claim. In its motion, Blackhawk alleged IMC was not a retailer for the purposes of Tennessee Code Annotated § 47-25-1302(a) where Blackhawk's vehicle and alignment equipment was not the type of equipment governed by the section. It further alleged that the risk faced and damages suffered by IMC were not compensable under § 47-25-1311. Following a reply by IMC, and an answer to the reply by Blackhawk, on September 14, 2004, the trial court granted Blackhawk's motion to dismiss on the ground that the damages sought by IMC were not those contemplated by § 47-25-1311.

On October 12, 2004, IMC filed a motion to alter or amend the judgment. In its motion, IMC asserted the compensatory damages it sought were contemplated by § 47-25-1311. It further asserted the statute was designed to protect against the actions taken by Blackhawk to terminate without cause. Following several rounds of responses and replies to responses, memorandums of law, the filing of affidavits and supplemental affidavits, and argument before the court, on December 8, 2004, the trial court denied IMC's motion to amend.

In its December order, however, the trial court stated that it initially had adopted Blackhawk's argument in its memorandum of law in support of its motion to dismiss. It stated that, for the purposes of its September order, it had considered no facts outside the pleadings, and had granted Blackhawk's motion to dismiss based on the allegations in the pleadings as construed in a light most favorable to IMC. However, the trial court further stated that, after consideration of the

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cause" means failure by a retailer to comply with requirements imposed upon the retailer by the retail agreement if such requirements are not different from those imposed on other retailers similarly situated in this state. In addition, good cause exists whenever:

(1) There has been a closeout on the sale of a substantial part of the retailer's assets related to the equipment business, or there has been a commencement of a dissolution or liquidation of the retailer;

(2) The retailer has changed its principal place of business or added additional locations without prior approval of the supplier, which shall not be unreasonably withheld;

(3) The retailer has substantially defaulted under a chattel mortgage or other security agreement between the retailer and the supplier, or there has been a revocation or discontinuance of a guarantee of a present or future obligation of the retailer to the supplier;

(4) The equipment retailer has failed to operate in the normal course of business for seven (7) consecutive days or has otherwise abandoned the business;

(5) The retailer has pleaded guilty to or has been convicted of a felony affecting the relationship between the retailer and the supplier; or

(6) The retailer transfers an interest in the dealership, or a person with a substantial interest in the ownership or control of the dealership, including an individual proprietor, partner or major shareholder, withdraws from the dealership or dies, or a substantial reduction occurs in the interest of a partner or major shareholder in the dealership. However, good cause does not exist if the supplier consents to an action described in this subsection.

papers filed concerning the motion to amend, it subsequently concluded, as a matter of law, that the 1991 version of Tennessee Code Annotated § 47-25-1301, *et seq.*, governed the parties' contract. The trial court determined that, taking into account the affidavits, the 2001 modification to Exhibit B of the contract did not constitute a material change such that the contract had been modified and, accordingly, subject to the code as amended in 1999. In its final order denying IMC's motion to amend, the trial court dismissed IMC's complaint on the ground that the contract was subject to Tennessee Code Annotated § 47-25-1301 *et seq.*, as it existed in 1991, and that "[t]he 1991 version of the statute . . . does not provide redress for the damages allegedly suffered by the plaintiff." IMC filed a timely notice of appeal to this Court. We reverse and remand.

Issues Presented

IMC presents the following issues for our review:

- (1) Whether the Trial Court erred in holding as a matter of law that the Sales Representative Agreement dated May of 1994, a continuing contract without a specific expiration date, was not governed by the 1999 amendment to Tennessee Code Annotated § 47-25-1301, *et seq.*, but was governed by the 1991 version of the statute.
- (2) Whether the Trial Court erred in holding that damages suffered by the Plaintiff for the wrongful termination of the Sales Representation Agreement, without cause, are not those contemplated by Tennessee Code Annotated § 47-25-1311, which section did not exist in the 1991 act.
- (3) Whether the Trial Court erred in holding the 1994 Sales [Representation] Agreement was not materially changed by the annual modifications to the agreement, the latest being in 2001, and after the 1999 amendment to Tennessee Code Annotated § 47-25-1301, *et seq.*

Standard of Review

A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint itself. *Cook v. Spinnakers of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). When the trial court considers matters outside the pleadings, a motion to dismiss is converted to a motion for summary judgment. *Adams TV of Memphis v. ComCorp of Tenn.*, 969 S.W.2d 917, 920 (Tenn. Ct. App. 1997). In the present case, the trial court clearly considered matters outside the pleadings. Moreover, although the trial court denied IMC's motion to alter or amend the judgment entered on September 14, its December 2004 order rested on entirely different conclusions of law and resulted from consideration of issues not raised in the original pleadings. Moreover, the entire legal premise of this action changed over the course of the proceedings in the trial court. Accordingly, we will review the trial court's order as an award of summary judgment.

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). We review an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002). The interpretation of a contract is also a matter of law which we review *de novo*, with no presumption of correctness afforded to the trial court. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999).

Analysis

We begin our analysis with IMC's assertion that the trial court erred in its determination that the damages it alleges are not the type of damages envisioned by Tennessee Code Annotated § 47-25-1311 as amended in 1999. Although the trial court initially dismissed IMC's action on the basis that IMC had not suffered damages as contemplated by the statute, the trial court significantly altered its judgment. The trial court's final order, as we read it, holds that the contract in dispute in this case is not, in fact, governed by § 47-25-1301, *et seq.* as amended in 1999. We do not read the trial court's order as a judgment in the alternative. Rather, as noted above, the basis of this action and the trial court's final judgment were premised on entirely different findings and legal conclusions. Ultimately, the trial court awarded summary judgment to Blackhawk on the grounds that the contract was governed by § 47-25-1301, *et seq.*, as it existed in 1991.⁴ Accordingly, we

⁴In 1999, the General Assembly significantly altered Tennessee Code Annotated § 47-25-1301, *et seq.* Acts 1999, ch. 193, §§ 1-15. Alterations to the Code relevant to this lawsuit include, *inter alia*, the definition of the term "retailer" in subsection 1301(4); the provision in subsection 1302 that retail agreements governed by the chapter may be terminated only for cause; and the addition of subsection 1311, which provides:

(a) A retailer may bring an action for civil damages in a court of competent jurisdiction against any supplier found violating any of the provisions of this part, and may recover damages sustained as a consequence of the supplier's violations together with all costs and attorneys' fees.

(b) The retailer shall be entitled to injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances of the retail agreement. The remedies in this section are in addition to any other remedies permitted by law.

Additionally, former subsection 1310, entitled "applicability of part," was amended and renumbered as 1312. Former subsection 1310 provided:

(a) The provisions of this part shall apply to all contracts now in effect which have no expiration date and are continuing contracts and all other contracts entered into or renewed after June 1, 1977. Any contract in force and effect on June 1, 1977, which by its own terms will terminate on a date subsequent hereto, shall be governed by the law as it existed prior to this part. The provisions of this part shall apply to inventory purchased after May 16, 1977.

(b) The provisions of this part relative to motorcycles shall apply only in instances when the franchise contract is terminated by the wholesaler, manufacturer, or distributor.

Current subsection 1312, as amended in 1999, provides:

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decline to address this issue as requiring an advisory opinion. We next turn to whether the trial court erred in determining that the modifications to Exhibit B of the contract did not materially modify the contract. We agree with the trial court that periodic changes to the sales quota set out in Exhibit B were anticipated by the 1994 contract and did not materially modify the agreement. However, we disagree that the additional modifications to Exhibit B of the contract in 2001 were not material, and reverse the trial court on this issue.

When construing a contract, the court must seek to ascertain and effectuate the intent of the parties at the time the agreement was executed. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn.2002). The court must construe the various provisions of a contract together, giving effect to each provision and seeking to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language they employed. *Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn. Ct. App. 2005).

As noted above, the parties regularly adjusted the sales quota provided in Exhibit B, and such modifications were anticipated by the 1994 contract. However, in 2001 Exhibit B was also modified to provide:

If the minimum sales performance level is not achieved, the representative may be placed on a 90 day curative probationary period with an action plan to attain an acceptable sales performance level (as per the curative probationary period policy as published from time to time).

If the acceptable performance level is not achieved by the end of the curative probationary period, the representative may be terminated, at the sole discretion of [Blackhawk].

In its brief to this Court, Blackhawk submits the modifications to Exhibit B must be construed in concert with and negated by paragraph 23 of the contract, which provides, “[t]his agreement constitutes the entire prospective agreement[.]” Blackhawk emphasizes the word “prospective” to assert that the contract would always and forever remain unmodifiable.

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The provisions of this part shall apply to all contracts and shall apply to all retail agreements in effect which have no expiration date and are a continuing contract, and shall apply to all other contracts entered into, amended, extended, ratified or renewed after May 16, 1977. The provisions of this part shall apply to and be binding upon all suppliers, all successors in interest or purchasers of assets or stock of suppliers, and all receivers, trustees or assignees of suppliers. Any contractual term restricting the procedural or substantive rights of a retailer under this part, including a choice of law or choice of forum clause, is void.

We find this argument somewhat disingenuous for two reasons. First, as Blackhawk also argues, the parties clearly anticipated that their prospective agreement would be modified from time to time with respect to the sales quota. Second, paragraph 25 of the 1994 contract provides that “the terms of [the] Agreement may be modified only in writing.” Clearly, the parties contemplated prospective modification where such modification was in writing. Exhibit B clearly was modified from time to time.

A modification to a contract is a change “which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect of the contract undisturbed.” 17A C.J.S. Contracts § 407 (1999). When an agreement is changed by mutual assent, it “becomes a new agreement.” *Id.* § 408. The “new agreement takes the place of the old and determines the rights of the parties” *Id.* A party’s agreement to a modification need not be express, but may be implied from a course of conduct. *Id.* § 409. Not every modification or amendment results in a new contract, however. Rather, the issue is “whether the existing rights were significantly altered.” *Id.* § 408.

The issue raised by the 2001 amendment to Exhibit B is whether the addition of the probationary period and curative procedures constitutes a material change to the agreement such that it may reasonably be considered a new agreement. In light of the totality of the contract, we believe it does.

The 2001 modifications to Exhibit B did more than increase the sales quota. The 2001 modification provided for the creation and enforcement of a “curative probationary period policy” which was neither referenced by nor an element of the 1994 agreement. Second, it mandated the creation of an “action plan” should the sales quota not be met. Again, the creation of such a plan was not anticipated by the 1994 agreement. Third, and most significantly, Exhibit B as modified implicitly modified the termination provisions of paragraph 18. It defined a specific “cause” provision and gave Blackhawk the right to terminate the contract immediately at the end of a newly created probationary period.

The 2001 modification to Exhibit B altered the termination provision of paragraph 18. In light of the parties’ rights and obligations under the contract, and in light of the intervening amendments to § 47-25-1301 *et seq.* in 1999, which, *inter alia*, prohibit termination without cause, this modification of termination rights was material. The legislative enactment of Tennessee Code Annotated § 47-25-1302, and the substantial amendments to part 13 of chapter 25, in themselves signify the material significance of termination provisions in contracts governed by the statute. Interestingly, the curative period added to Exhibit B in 2001 reflects § 47-25-1302(b) as amended in 1999.⁵

⁵Section 1302(b), as amended in 1999, provides:

Except as otherwise provided herein, a supplier shall provide a retailer with at least ninety (90) days’ written notice of termination, cancellation or nonrenewal of the retail agreement and a sixty-day right

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Blackhawk submits that this dispute is not governed by § 47-25-1301, *et seq.* where IMC is not a retailer under the section. This issue, however, has not been adjudicated and is not the basis for the trial court's final order. Rather, the trial court premised its order on its determination that the contract was not governed by the statute as amended in 1999 because the 2001 modifications were not material. Upon remand, whether this contract as modified in 2001 is governed by § 47-25-1301, *et seq.* may be adjudicated in the trial court.

The 2001 modification to Exhibit B establishing a probationary period and curative policy modified the termination provisions of the 1994 agreement. The termination rights in the continuing contract in this case significantly and materially affect the parties' rights under the contract. In light of the totality and nature of the agreement, this modification was sufficiently material to result in a new contract.

Holding

In light of the foregoing, we reverse the award of summary judgment to Blackhawk. Accordingly, if this contract as modified in 2001 is governed by Tennessee Code Annotated § 47-25-1301 *et seq.*, it is governed by the statute as amended in 1999.

As stated above, we note that the trial court has not addressed Blackhawk's assertion that IMC was not a retailer for the purposes of the statute. Blackhawk, moreover, does not concede that either version of the statute applies to this contract. Because Blackhawk had the right to terminate the contract without cause under the pre-1999 version of the statute, the trial court's ruling mooted this issue. In light of our holding that the contract was in fact modified in 2001, this issue remains a viable issue.

Our holding here is determinative to this appeal. Accordingly, the issue of whether Tennessee Code Annotated § 47-25-1301, *et seq.*, as amended in 1999, retroactively applies to contracts entered into prior to 1999 is pretermitted as requiring an advisory opinion. Accordingly, we decline to address Blackhawk's assertion that retroactive application of the statute as amended would be unconstitutional. We likewise decline to address whether the damages asserted by IMC are the type of damages contemplated by § 47-25-1311 where the trial court did not premise its final judgment on this determination. Further, insofar as the trial court's order of September 2004 may be read as an alternative order granting Blackhawk's motion to dismiss, we reverse where the pleadings, standing alone, suffice to establish a *prima facie* case.

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to cure the deficiency. If the deficiency is cured within the allotted time, the notice is void. In the case where cancellation is enacted due to market penetration, a reasonable period of time shall have existed where the supplier has worked with the dealer to gain the desired market share. The notice shall state all reasons constituting good cause for action. The notice is not required if the reason for termination, cancellation or nonrenewal is a violation under the provisions of subsection (a).

This matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellee, Equipment Services, Inc., d/b/a Blackhawk KJ.

DAVID R. FARMER, JUDGE